(3)

No. 05-966

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2005

RON CATHEL, Administrator, New Jersey State Prison and
NANCY KAPLEN, Acting Attorney General, State of New Jersey

Petitioners,

v.

ROBERT O. MARSHALL,

Respondent.

RESPONSE BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEPHEN W. KIRSCH
COUNSEL OF RECORD
Assistant Deputy Public Defender

YVONNE SMITH SEGARS
Public Defender of New Jersey
Office of the Public Defender
P.O. Box 850
Trenton, New Jersey 08625
(609) 292-1746

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STATEMENT OF THE CASE

Respondent Robert Marshall, a then-46-year-old businessman from Toms River, New Jersey, with no prior record, was tried in 1986 for murder for hiring a hitman to kill his wife, Maria Marshall. At the time of the crime, Marshall was having an extramarital affair. The facts related to the crime are detailed at length in the two opinions of the Third Circuit in this case and need not be recounted here. Marshall v. Hendricks [Marshall V], 307 F.3d 36, 44-50 (3d. Cir. 2002); Marshall v. Cathel [Marshall VII], 428 F.3d 452, 454-455 (3d. Cir. 2005). However, suffice it to say that the State's proofs included evidence of various attempts by Marshall to increase the life insurance on both himself and his wife prior to the crime, and proof that Marshall was having financial difficulties at the time.

Respondent was convicted on March 5, 1986, whereupon his family -- including his youngest son John, sister Oakleigh DeCarlo, and his brother Paul -- immediately left the courthouse for the day. Marshall VII, 428 F.3d at 455. But, unbeknownst to them, the penalty phase was scheduled to begin that day. Respondent Marshall required medical assistance as he was escorted from the courtroom after the guilty verdict and, after being taken to the hospital, was returned to the courtroom at about 1:35 or 1:40 p.m., whereupon the penalty phase began within minutes at 1:45 p.m. Id. The only discussion that

Marshall's attorney, Glenn Zeitz, ever had with him about the penalty phase occurred during those few minutes between his arrival back in court and the commencement of the penalty phase. Marshall v. Hendricks [Marshall VI], 313 F.Supp. 2d 423, 429 (D.N.J. 2004).

In the penalty phase, the attorneys presented no witnesses and no documentary evidence, but merely gave closing arguments. Attorney Zeitz admitted at the habeas corpus evidentiary hearing before the federal district judge that neither he, nor anyone associated with his office, interviewed a single mitigation witness in preparation for the penalty phase, nor otherwise investigated any mitigation evidence at all even when confronted with what he deemed to be "devastating" evidence of guilt. Id. at 459-462. Despite his complete non-preparation for the penalty phase, Zeitz did not ask for a continuance, which he admitted he would have received, in order to assemble a mitigation case. (A105 to 106)[1] Rather, he simply made an "agreement" with the prosecution to do what he otherwise had no choice but to do in light of his lack of mitigation investigation: sum up to the jury.[2]

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[1] A- Appendix to petitioner's 2005 Third Circuit appeal.

[2] As noted in the Third Court opinion, the trial prosecutor testified at the habeas hearing that Zeitz approached him about such an "agreement" by stating, "I've already presented everything during the course of my case in chief and during the trial and there really is nothing I can add to it." Marshall VII, 428 F.3d at 461.

But that very brief summation was, like the rest of Zeitz's efforts, almost completely absent of any effort to save his client's life. Zeitz told the jurors that giving a summation for his client was "difficult" for him, told the jury that Marshall had no criminal record (a fact the State had conceded), mentioned that Marshall was involved in his community, but that Zeitz did not "want to stand here and go through the whole litany of things that he's done" and then told the jury to do whatever they wanted and that any result would be fine with him and his client: "All I can say is this, that I hope when you individually consider the death penalty, that you're each able to reach whatever opinion you find in your own heart, and that whatever you feel is the just thing to do, we can live with it." Marshall VII, 428 F.3d at 457.

The jury returned a death sentence within 90 minutes, finding that the aggravating factor offered by the State -- that the killing was for hire -- outweighed the two mitigating factors which were offered, i.e., the defendant's absence of a prior record and an unspecified "any other factor which is relevant."

After State appeals and post-conviction relief were exhausted without a requested evidentiary hearing and a habeas petition was initially denied by the federal district court, the Third Circuit remanded the matter to the district court for an evidentiary hearing on the sole issue of ineffective assistance

of counsel at the penalty phase. Marshall V, 307 F.3d at 117. That evidentiary hearing produced testimony which led the district judge to reverse his previous ruling and grant habeas relief as to penalty, holding that the contrary rulings of the New Jersey Supreme Court were an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984).

Specifically, the evidentiary hearing produced the following testimony[1]: Zeitz admitted never having had a targeted discussion with anyone -- including any of Marshall's three sons -- in order to determine who would make a suitable penalty-phase witness. (A155 to 156; A162). He also spoke to no experts about testifying and did not have anyone to assemble a social history of Marshall for use at the penalty phase. (A191; A199). He had no "working list" of mitigating factors and no penalty-phase discovery to turn over to prosecutors if a guilty verdict were returned. (A144 to 146). Nevertheless, he regarded the State's guilt-phase case as "overwhelming" and "very strong," so he knew a penalty phase was a likely occurrence. (A154; A321). He also knew of no "rebuttal" evidence in the State's possession that might cause an attorney to hesitate regarding the use of certain mitigation evidence. (A191).

Attorney Zeitz attempted at the evidentiary hearing to portray his client as unwilling to have Zeitz give the

[1] That testimony is recounted in full in Marshall's Third Circuit brief. He will not repeat that recitation here, but, rather, only the highlights of it.

impression to potential witnesses that he might not believe in his client's innocence, but Zeitz gave no indication of why he did not at least approach potential penalty-phase witnesses once the guilt phase was concluded. (A453; A124). Indeed he even testified that he does not "disagree with the proposition" that when one represents a capital defendant in a case involving overwhelming proof of guilt, "that simply highlights or underscores the need for an exhaustive preparation for the penalty phase." (A446 to 447)

Douglas DeCarlo, Marshall's brother-in-law, testified that Zeitz never informed family members what a penalty phase might consist of, and that he, his sister and all three Marshall boys would have been present in court and testified to spare respondent's life if asked by Zeitz to do so. (A219 to 225) John Marshall testified similarly that he and his brothers would all have testified to plead for their father's life. (A381 to 382) Respondent testified himself that his boys were very supportive of him at the time of trial and that Zeitz never spoke to anyone in respondent's family "about the penalty phase ever," and did not even tell him about his right of allocution. (A716; A727 to 728; A818 to 820)

In addition to evidence showing Zeitz's failure to interview the three Marshall boys, Marshall's sister Oakleigh DeCarlo and her husband Douglas DeCarlo about testifying as mitigation witnesses, evidence was also presented at the

evidentiary hearing to show that Zeitz failed to speak to the following penalty-phase mitigation witnesses: Marshall's three siblings, all of whom would have asked the jury to spare Marshall's life (A509 to 512); Tom North, a friend who would have asked the jury to spare Marshall and would have told the jury of the hardship his execution would cause friends and family as well as given insight into his personality (A514 to 516); Michael Conlin and Bill Lundy, who would have testified about Marshall's many organizational activities with the local youth swim teams (A516 to 519); Nikki Daly, Marshall's secretary who spoke well of Marshall's community activities and kindness as a boss (A520; A672 to 674); Cathy Sauer, who would have detailed Marshall's United Way activities as fund-raising chairman (A521); Jack Zerrer, Jack Miller and Dave Connelly, business associates, who would have confirmed Marshall's charitable work (A521); Thomas and Lynn Fenwick, who would have recalled Marshall's swim-team activities, "community oriented" nature, and activities with his children (A521; A677 to 680); Reverend James McColl, who would have asked the jury to spare Marshall's life despite his usual "eye for eye" belief in the death penalty (A644 to 645); Henry Tamburin, a business associate who would have testified to Marshall's love for and involvement with his children (A649 to 653); Stanley Slaby, who would have testified similarly to Tamburin and noted Marshall's swim-team activity (A653 to 655); Ev Hutchinson, a former

business associate who would have testified to Marshall's skill as a mentor (A682 to 685); an expert witness to tell the jury of Marshall's likelihood to contribute in a very positive way to prison discipline and peer-to-peer and mentoring programs if he were a life-sentenced inmate (A 582 to 598); and, finally, an allocution statement from Marshall himself begging for his life for the sake of his sons.

At the evidentiary hearing, Marshall presented expert testimony to demonstrate Zeitz's failings in the case, and that expert concluded that in every other capital trial in New Jersey that went to penalty phase from 1982-1986, defense attorneys interviewed mitigation witnesses, investigated mitigation cases and put on mitigation cases at the penalty phases of those trials. (SA252 to 271[4]; A975 to 979) The expert, Carl Herman, Esq., "can't imagine a good reason why Zeitz did not speak to potential witnesses," especially Marshall's three sons, and his sister Oakleigh, who all could have provided "extremely powerful mitigation." (A903; A1010; A1013) Indeed he could also not fathom why, having failed to do any pre-guilt-verdict mitigation investigation, Zeitz failed to ask for a continuance in order to do such an investigation. (A877 to 878) Herman opined that Zeitz's representation failed both prongs of the Strickland test for ineffective assistance of counsel. (A890; A932)

[4] SA - Supplemental Appendix to petitioner's 2005 Third Circuit appeal.

Indeed, the State's own expert, William Graves, Esq., called to counter Herman's testimony, ended up agreeing with Herman that Zeitz "should have interviewed all three of the [Marshall] children" as well as Oakleigh DeCarlo, about testifying at the penalty phase. (A1195 to 1196)

This case reaches the Court on the State's petition for certiorari from the Third Circuit's decision to affirm the granting of penalty-phase habeas relief based upon the New Jersey Supreme Court's unreasonable rejection, without even an evidentiary hearing, of petitioner's claim of ineffective assistance of counsel in violation of the Sixth and Fourteen Amendments. As urged infra in the legal argument, the petition should be denied as it presents no substantial question for certiorari and challenges an unassailable ruling of the Third Circuit.

LEGAL ARGUMENT

POINT I

THE DECISION OF THE THIRD CIRCUIT TO AFFIRM THE DISTRICT COURT'S GRANT OF PENALTY-PHASE HABEAS RELIEF IS AN UNASSAILABLE AND UNREMARKABLE APPLICATION OF UNITED STATES SUPREME COURT PRECEDENT AND, CONSEQUENTLY, THE PETITION FOR CERTIORARI SHOULD BE DENIED.

The case before the Court involves a near-complete failure of the adversarial process in the penalty phase of a capital murder trial, leaving both of the federal courts which have reviewed the matter so far with "little confidence that [respondent] Marshall was afforded the guarantees to which he is entitled under the Sixth Amendment." Marshall v. Cathel [Marshall VII], 428 F.3d at 452, 465 (3d. Cir. 2005); see also Marshall v. Hendricks [Marshall VI], 313 F.Supp. 2d 423, 457 (D.N.J. 2004) (same). As detailed in the Statement of the Case, supra, respondent's trial attorney, Glenn Zeitz, Esq., did no investigation towards the assembling of a mitigation case for the penalty phase. In fact, the district court found as a fact that Zeitz did not even discuss the penalty phase with his client until moments before it began. Id. at 429. Attorney Zeitz interviewed no witnesses, gathered no documentation, and failed even to speak to any of respondent's three sons regarding their desire to ask the jury to spare their father's life -- an omission so glaring, and so far off the scale of reasonable conduct by an attorney in a capital case, that the prosecution's

own expert witness admitted on cross-examination at the habeas evidentiary hearing in the district court that attorney Zeitz should have interviewed the boys and respondent's sister, Oakleigh DeCarlo, before making any decision about his presentation (or lack thereof) at the penalty phase. (A1199 to 1200; A1205).

Having done no investigation whatsoever, attorney Zeitz then: allowed the penalty phase to commence only a short time later on the same day that the guilt phase ended without asking for a continuance in order to assemble a mitigation case,[5] failed to present any evidence -- testimonial or otherwise -- in mitigation, and summed up to the jury in a short rambling discourse that never asked the jury to spare the defendant's life, concluding instead with the statement, "[W]hatever you feel is the just thing to do, we can live with it," a comment the Third Circuit refers to as "a verbal shrug of the shoulders." Marshall v. Hendricks [Marshall V], 307 F.3d. 36, 101 (3rd. Cir. 2002).

As noted, supra in the Statement of the Case, at the evidentiary hearing respondent Marshall presented numerous witnesses to demonstrate what the mitigation case was that attorney Zeitz should have investigated in 1986. The available witnesses ranged from respondent's three teenage sons (Roby,

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[5] A request he admitted, at the habeas evidentiary hearing, would have been granted. (A105 to 106).

Chris and John) and other family members, to business associates, to friends, to a minister, to a psychologist who could have testified about the devastating effect the respondent's execution would have on his children, and to a corrections expert who could have testified that respondent, as a then-46-year-old college-educated businessman with no prior record, would be a "jewel" in the prison system and a substantial mentor to other inmates.

The petitioner in this Court, the State of New Jersey, makes the same unreasonable errors regarding the application of Strickland v. Washington, 466 U.S. 668 (1984), that the New Jersey Supreme Court made[6] -- (1) ignoring the wealth of evidence that Zeitz failed to investigate[7]; (2) assuming tactical and strategic bases for Zeitz's inaction where none existed and whenever counsel had a "difficult choice to make," Marshall V, 307 F.3d at 109-110; (3) analyzing the prejudice prong of Strickland while "failing to consider what a lengthier, more adversarial presentation with evidence in mitigation might have contained and how that would have impacted the jury's

[6] The New Jersey Supreme Court handled this issue in two parts: first addressing in the direct appeal counsel's poor performance in the penalty phase, State v. Marshall [Marshall I], 586 A.2d 185, 173-174 (N.J. 1991), and, second, addressing his lack of investigation (as well as more on his poor performance) in the state post-conviction-relief (PCR) appeal. State v. Marshall [Marshall III], 690 A.2d 1, 82-83 (1997).

[7] The New Jersey Supreme Court did not even order an evidentiary hearing in the case. That never occurred until ordered by the Third Circuit. Marshall V, 307 F.3d at 117.

deliberations," id. at 114; (4) ignoring the very function of mitigating evidence in a case like this (i.e., to humanize a capital defendant despite his crime) by viewing as hopeless the prospect of sparing the defendant; and (5) unreasonably failing to recognize that Glenn Zeitz's lack of investigation robbed his inaction of any possible tactical basis and therefore constituted ineffective assistance of counsel under Strickland.

This is not, by any means, a close case. The Court has addressed ineffective assistance of counsel in the penalty phase of a capital case quite often of late, and whether it be through Wiggins v. Smith, 539 U.S. 510, 522 (2003), Williams v. Taylor, 529 U.S. 362, 396 (2000), Bell v. Cone, 535 U.S. 685, 699-702 (2002), or Rompilla v. Beard, 125 S.Ct. 2456, 2462-2469 (2005), the plainly-apparent rule that has carried the day in each of those cases is that an attorney may do (or not do) almost anything in defense of a client at the penalty phase of a capital case as long as there has been proper investigation of mitigation. Put differently, the attorney who thoroughly does his or her homework in preparing a mitigation case has no concern with being second guessed by this Court or any other, when he or she makes truly tactical choices about which evidence to use or which argument to make, but the attorney who does not properly investigate the case loses any presumption of correctness that his or her tactical choices would otherwise have had there been proper investigation.

This rule dates at least back to Strickland where the Court made clear that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," while "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-691.

Yet, whether one compares the representation in this case with that in Williams, Wiggins or Rompilla (where the capital defendants prevailed) or in Cone (where he did not), the level of penalty-phase investigation in all of those cases was substantially higher than here. Indeed, it is the realization of this very fact -- that the complete dearth of any mitigation investigation here is "off the scale" when compared to other cases -- which makes this matter so grossly inappropriate for a grant of certiorari. As the Third Circuit observed so cogently, "To be clear, this is not a case that calls upon us to define the contours of the 'few hard edged rules' spawned by evaluations of counsel's ineffectiveness." Marshall VII, 428 F.3d. at 471, quoting Rompilla, 125 S.Ct. at 2462 (noting "that the merits of counsel's choices in [Rompilla] were subject to debate").

In Rompilla, counsel interviewed defendant's family members in preparation for the penalty phase and even had three different experts examine the defendant, but counsel's efforts

were deemed insufficient because other evidence in the prosecutor's file which could have affected the jury's weighing of the aggravating and mitigating factors in defendant's favor was not investigated. 125 S.Ct. at 2462-2469.

In Williams, the defendant's mother, two neighbors and a psychiatrist were called as mitigation witnesses, but the absence of proper investigation of other mitigation evidence of the defendant's abusive upbringing, "borderline retarded" condition and prison accomplishments nonetheless rendered the attorneys' assistance substandard. 529 U.S. at 369, 395-396; Williams v. Commonwealth, 3609 S.E.2d. 361, 379 (Va. 1987); Williams v. Warden, 487 S.E.2d 194, 196 (Va. 1997); Williams, Brief of Respondent, 1999 W.L. 641, 451 at 5.

Moreover, in Wiggins, the attorneys even "knew" some of the basic historical facts of the defendant's abusive childhood because the presentence investigation (PSI) report had discussed some of that evidence, and thus chose not to use it as mitigation. But this Court emphasized that merely generally being aware of some details of mitigation is no substitute for a full investigation into all the relevant mitigation and that an incomplete investigation will rob any later judgment by the attorney of a justifiable claim of "strategy" or "tactics." Wiggins, 539 U.S. at 520-524.

Similarly, in Cone, the capital defendant lost in this Court precisely because his attorney had properly investigated

the case, meeting with other mitigation witnesses and putting on "extensive" testimony on the defendant's mental breakdown and post-Vietnam-War drug dependency. 535 U.S. at 699-702.

Robert Marshall's case needs none of the subtle reasoning of the aforementioned line of cases where the Court was called upon to wade into somewhat murky waters and decide how much mitigation investigation is "enough." Rather, here, the answer is easy because Attorney Zeitz admitted that he did nothing to prepare a penalty-phase mitigation case. Yet the State in its petition attempts to make the case look closer than it is, attacking the judgment below on multiple grounds, each of which will be briefly addressed here in order to demonstrate the lack of any viable issue for certiorari.

Some of the State's argument urges the same thing that Attorney Zeitz did at the habeas evidentiary hearing -- that despite not even investigating mitigation for the penalty phase, he "mitigated" penalty in the guilt phase, a clever attempt to invoke Bell v. Cone, but a wildly inaccurate portrayal of this case. The evidence that the State and Zeitz claim to have constituted mitigating guilt-phase evidence was: respondent's own guilt-phase testimony, Zeitz's guilt-phase opening statement, four truth-and-veracity "character" witnesses, the brief testimony of respondent's sons on a solitary fact unrelated to penalty and three "suicide" tapes made by respondent for his sons during a botched suicide attempt after

the murder. But even a brief analysis of that evidence reveals it to have had little to no use for the penalty phase.

The four guilt-phase character witnesses, whose testimony Zeitz regarded so highly as to obviate, in his view, the need for the investigation, preparation, presentation and argument of any penalty-phase mitigation case, testified as follows: Gerald Hughes testified that respondent is "a law abiding citizen, that he has integrity, [and] that he has truthfulness [sic]." (A1314). Hughes also offered, with no specifics, that respondent is "an upstanding professional insurance agent, businessman and family man." (A1312 to 1313). Henry Tamburin claimed that respondent is law-abiding, truthful and honest. (A1343). So did Thomas Fenwick (A1379), and Lynn Fenwick, (A1380).

Contrary to Zeitz's apparent view that he presented extensive penalty-mitigation evidence through Marshall's own guilt-phase testimony, a reading of that testimony reveals little of the sort. Marshall quickly mentioned at the guilt phase where he went to high school and college (A1351), briefly named a few of his relatives (A1351 to 1352), and mentioned in passing that he had raised money for a few charities. (A1355). Above and beyond the fact that the jurors obviously decided he was lying in the rest of his 400-plus pages of testimony, which was spent denying responsibility for the murder of his wife, and, thus, were unlikely to give any of the few pages of his

"background" testimony a second thought thereafter, that "background" testimony has precisely one piece of mitigation evidence in it - the brief reference to charitable activity -- a poor substitute for a full and proper penalty-phase mitigation investigation under Wiggins, Williams and Strickland.

Moreover, Zeitz's own recitation of Marshall's background in his guilt-phase opening statement provided little else of "mitigation" evidence (A1296 to 1300), and, most importantly, was not evidence at all, and the jury was properly instructed as such -- instructions they are presumed to have followed under New Jersey law. State v. Manley, 255 A.2d 193, 200 (N.J. 1969). Zeitz even distorted the record in that same opening, telling the jury that the "character" witnesses would "give you some insight into [Marshall's] character as a person," but, instead they addressed little but his alleged truth and veracity, which the jury obviously did not believe. (A1300). Finally, Zeitz's reference at the habeas hearing to the boys' guilt-phase testimony and the "suicide" tapes which Marshall made for them is no more convincing as mitigation than the four "truth and veracity" witnesses, the value of whose testimony was obliterated as soon as the guilty verdict was returned, indicating that the jury did not believe them or Robert Marshall. The suicide tapes Marshall made for his sons proved at best that petitioner loved his sons, not that they or anyone

else loved him in return or cared a whit about his possible execution.[8]

There is absolutely nothing of mitigating value in any of the boys' guilt-phase testimony. John Marshall testified only that respondent sounded "really depressed -- and upset" when he talked to him the night of the suicide attempt. (A1386). Chris Marshall said, "He sounded nervous," that same night (A1390), and Roby Marshall testified that respondent "sounded shaky, like he's been through a lot." (A1406).[9] None of that testimony was remotely a substitute for a targeted interview with each boy at the return of the guilt-phase verdict in order to determine whether each would have testified at the penalty phase in order to plead for his father's life -- interviews which even the State's expert testified should have been conducted, and which John Marshall and Douglas DeCarlo both testified would have caused all three boys to plead for respondent's life. Yet Glenn Zeitz interviewed no one in preparation for a penalty phase.

The Third Circuit properly observed that while there is nothing wrong, as a general proposition, with using guilt-phase

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[8] Indeed, as the Third Circuit noted, a reasonable juror could infer from Zeitz's closing remarks to the jury that neither he nor respondent cared either: "Whatever you feel is the just thing to do, we can live with it" is at best a "verbal shrug of the shoulders." Marshall V, 307 F.3d at 101.

[9] Roby also provided some factual testimony relevant only to the guilt phase. (A1400 to 1406)

evidence in the penalty phase as mitigation, here the guilt-phase evidence at issue either did not relate to penalty at all once the jury rejected the defense at the guilt phase and found respondent to be untruthful, or was not actually used by or referred to by Zeitz in the penalty phase:

> [T]he penalty phase is a different animal, where the stakes are completely different from those encountered in the guilt phase. With the outright rejection of Marshall's defense, which is the only way the guilty verdict can be interpreted, Zeitz knew that the jury also had rejected the character evidence submitted in support of that defense. Indeed, it would only be fair to assume that they had found Marshall to be a liar and a despicable person for paying someone to have his wife killed. Zeitz's clear duty at that point was to shift his focus away from absolving Marshall of involvement in his wife's murder -- certainly, the evidence for the guilt phase had not worked for that purpose -- to saving his life. While counsel can harken back to evidence from the guilt phase during the penalty phase, here, Zeitz failed to allude to any of what he thought to be compelling character testimony from the guilt phase. He seemed to assume the jury would consider it anew during the penalty phase. We can only reason that Zeitz *hoped* this would suffice for the simple reason that he had no additional evidence or witnesses, and, he had none because he failed to prepare any witnesses or conduct any investigation into potential penalty phase mitigating evidence or testimony. This omission flies in the face of the "prevailing professional norms" in 1986 which were well-established not only by national ABA standards but in the relevant jurisdiction, as well.

Marshall VII, 428 F.3d at 468.

Indeed the similarity between this case and Wiggins does not end with the fact that both defense attorneys failed to investigate mitigating evidence despite "knowing" its availability for investigation. Rather, just as the attorneys in Wiggins did not even follow their alleged "strategy" of foregoing mitigation in favor of proving a lack of responsibility for the death of the victim, thereby leading this Court to determine that their alleged "strategy" appeared to be more of a "post-hoc rationalization of counsel's conduct than an accurate description of [counsel's] deliberations prior to sentencing," Wiggins, 539 U.S. at 526-527, here Zeitz also did not even follow his alleged "strategy" of highlighting in the penalty phase the boys' guilt-phase testimony, their father's "suicide tapes" to them or any of the "character" testimony from the guilt phase. Not one line of Glenn Zeitz's cursory penalty-phase summation focuses on the boys, those tapes or the "character" witnesses. But that is of little surprise when not one line of that same summation even asks the jury to spare Marshall's life. As in Wiggins, not only are counsel's alleged "strategic" decisions unsupported by the requisite level of investigation which would allow the attorney to make informed tactical choices regarding mitigation, but even the veracity of counsel's claim of strategy is called into question when the record shows that he did not even actually follow the strategic

path he allegedly chose -- a point noted by the Third Circuit. Marshall VII, 428 F.3d at 468.

Nor are the State's or Zeitz's other justifications for his admitted lack of penalty-phase investigation of any legal significance. The State has claimed that Marshall was a "difficult" client who did not want his attorney to show weaknesses regarding his belief in his client's innocence, and that there was a "deal" struck between Zeitz and the assistant prosecutor, Kevin Kelly, to proceed in a minimalist fashion at the penalty phase. The Third Circuit dealt with each of these claims properly.

That court properly rejected any notion that Zeitz was somehow absolved from investigating mitigation because his client was "difficult" or was claiming he was innocent and wanted his attorney to focus first on the guilt phase. Id. at 467-668. The Strickland/Williams/Wiggins line of cases makes no distinction between cases where the guilt-phase defense is a vigorous denial and ones where the entire focus of the case from the outset is winning only the penalty phase.[10] In either instance the attorney has a sworn duty to investigate a case in mitigation. See Silva v. Woodford, 279 F.3d 825, 846-847 (9th Cir.), cert. den. 537 U.S. 942 (2002) (attorney deemed

[10] Indeed, Wiggins was a case where counsel's focus was on denying the client's "direct responsibility for the murder." 539 U.S. at 518. But, obviously, the Wiggins opinion rests on the holding that that strategy did not obviate the need for a mitigation investigation.

ineffective when he blindly accepted client's command not to speak to certain witnesses after otherwise conducting insufficient investigation of mitigation). Moreover, even if the law recognized some lower level of duty of counsel in a case where denial of responsibility is the defense -- and it most surely does not -- the duty to investigate a mitigation case once the guilt verdict is returned would not change.[11] At that point the guilty verdict is in, and, if necessary, the attorney should ask for time to investigate witnesses and assemble a mitigation strategy, if he or she had not been able to so far. Obviously, that was not done here. In fact, the antithesis of that took place here when the penalty phase took place the same day the guilty verdict was returned with no investigation of a mitigation case at all. Thus, to whatever extent the State is alleging that Marshall's vigorous claim of innocence at the guilt phase hampered Zeitz's investigation of a penalty-phase mitigation case, that excuse should be dismissed as legally

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[11] In any event, it is a serious distortion of the record to claim that respondent forbade Zeitz from talking to witnesses. At most, he wanted Zeitz to try vigorously to win the guilt phase and to not give family members the impression he likely would lose that phase, but obviously one can easily interview mitigation witnesses without defining the interview to the witness as a "penalty-phase interview." Moreover, once the guilty verdict was returned, there is not a hint that Zeitz was in any way hampered from interviewing mitigation witnesses. He just did not do so. Indeed, as noted, the district judge found as a matter of fact that Zeitz never discussed anything about the penalty phase with Marshall until moments before the penalty phase began. Marshall VI, 313 F.Supp. at 429.

irrelevant and as another "post-hoc rationalization" for Zeitz completely abdicating his penalty-phase responsibilities. Wiggins, 539 U.S. at 526-527. Zeitz's protestations ring hollow when, upon return of the guilt-phase verdict, he did nothing to investigate a mitigation case.

Additionally, as the Third Circuit held, Marshall VII, 428 F.3d at 472, the pre-penalty-phase/post-guilt-phase "deal" between Zeitz and Assistant Prosecutor Kelly is of no legal significance for a number of reasons. That "deal" was described by Zeitz as a post-guilt-verdict agreement between him and Kelly that: (1) Kelly would abandon two of the three aggravating factors, (2) neither side would call penalty-phase witnesses, and (3) neither man would go on at length in their summations in advocating for his particular position. But Kelly made it clear, in his testimony for the State, that the "deal" was entered into when Zeitz approached him, told Kelly that he had "nothing" in the way of mitigation evidence to put on in the penalty phase, and wondered if Kelly would consent to the deal as eventually agreed upon. Marshall VII, 428 F.3d at 461.

Glenn Zeitz was clearly in no position to offer or accept any kind of "deal" regarding the penalty phase because he had done no penalty-phase investigation, as the Third Circuit held. Id. at 472. As in Wiggins, an attorney who has failed to investigate properly a mitigation case is unequipped to make reasonable tactical decisions regarding mitigation strategy.

123 S.Ct. at 2535-3539; see also Coleman v. Mitchell, 268 F.3d 417, 444-447 (6th Cir. 2001), cert. den. sub. nom. Coleman v. Bagley, 535 U.S. 1031 (2002) (capital defendant's request to place severe limitations on mitigation case cannot be abided by counsel unless counsel has adequately investigated mitigation); Battenfield v. Gibson, 236 F.3d 1215, 1229 (10th Cir. 2001) ("strategic" decision to "focus on sympathy and mercy" is not worthy of deference if based on inadequate investigation); Emerson v. Gramley, 91 F.3d 898, 906-907 (7th Cir. 1996), cert. den. sub. nom. Gilmore v. Emerson, 520 U.S. 1139 (1997) (attorney cannot abide by client's wish not to present mitigation if attorney has not investigated a mitigation case adequately and, thus, does not know what is being given up and is not making an informed decision). Glenn Zeitz had no mitigation case investigated or prepared, so he had no clue what he was abandoning when he agreed to the "deal." That is not a "tactical" strategy; rather, it is abdication of the duty to investigate, as in Wiggins, Emerson, Coleman and Battenfield, and is entitled to no deference. The Third Circuit correctly observed, "Agreement or not, Zeitz simply had no penalty phase evidence to present" because he had done no investigation. Marshall VII, 428 F.3d at 472.

And, of course, even under the "deal" it was not agreed that Zeitz would make no plea at all for his client's life and tell the jurors that whatever they wanted to do would be fine

with him and his client. In other words, even as ill-equipped as he was to evaluate such a deal -- and that alone forecloses it from being valid -- Zeitz ultimately did not even follow the uninformed deal that he struck. He had never agreed to give only a "verbal shrug of the shoulders," Marshall V, 307 F.3d at 101, yet that is what he did -- belying any claim that "strategy" was at work here.

Also, with regard to the performance prong of Strickland, the State mischaracterizes the two most recent federal rulings in this case as setting up "per se rules" regarding an attorney asking for a continuance between guilt and penalty phases or summing up to the jury in a particular way. In fact, nothing of the sort is contained in either of those opinions. Both the district-court and circuit-court opinions make it clear that the discussions of Zeitz's deficiencies in terms of failing to ask for a continuance between phases or failing to plead for his client's life are premised on his failures to investigate mitigation. "With the understanding that Zeitz's failure to investigate a mitigation case permeates and underlies all aspects of the penalty phase, we now turn to an examination of [Marshall's] remaining claims, which challenge the substance of the mitigation case presented by Zeitz." Marshall VI, 313 F.Supp.2d at 453; see also Marshall VII, 428 F.3d at 464-474 (addressing first the lack-of-investigation claim, and then the other claims in light of that one).

Thus, far from being decisions which stray from Strickland by setting up "per se rules" for attorney conduct, as the State would like this Court to believe, in fact the decisions in both the district court and Third Circuit carefully have applied Strickland and only have criticized the attorney's performance at trial in light of his failure to investigate. The Court should reject the State's arguments to the contrary.

In its petition, the State then focuses on the "prejudice prong of Strickland and makes much of what it perceives to be a significant difference between many death-penalty cases and this one --- the fact that, in Wiggins, Rompilla and other cases, the mitigation which defense counsel failed to properly investigate involved allegations that the capital defendant was less culpable because he was abused when he was a child, whereas Robert Marshall suffered no such abuse. The State's observation of this "difference" is no reason to grant certiorari. To accept the State's argument one must accept the proposition that Robert Marshall, a then-46-year-old man with no prior record, could not be saved from the death penalty despite significant humanizing evidence in mitigation that was not ever investigated -- in other words that not one reasonable juror could doubt the need for the death sentence had this case been properly investigated instead of presented as it was. The Third Circuit properly rejected such a claim and so should this Court.

As noted by the Third Circuit, in a "weighing" state such as New Jersey where the vote of only one juror is enough to prevent a death sentence, it is "impossible to conclude" that had this case been properly investigated and had defendant actually been properly represented in an adversarial manner thereafter, at least one juror would not have probably voted otherwise, Marshall VII, 428 F.3d at 472-477, quoting Marshall V, 307 F.3d at 103-104, or, in the words of Strickland, that one's "confidence in the outcome" would not be "undermine[d]." Strickland, 465 U.S. at 694.

The Third Circuit properly observed that if one looks at Zeitz's summation, one would think that the only reasons to spare Marshall's life were his previously "law abiding nature" and his lack of prior criminal activity, but so much more was available through proper investigation. Marshall VII, 428 F.3d at 473. That available, but uninvestigated and unused, evidence would have shown a loved, respected, active member of the community with friends, three children and other family members willing to plead for his life, and a criminal defendant for whom life in prison would have been (1) an appropriate punishment, (2) a benefit to the prison system, and (3) a benefit to his children and family, who otherwise would have been devastated by his execution. This case, as noted by the Third Circuit, epitomizes the very "unreliable result" of a "breakdown in the adversarial process that our system counts on to produce just

results." Strickland, 466 U.S. at 696, cited by results. Marshall VII, 428 F.3d at 473.

The State's error in its petition is fundamental -- assuming that because most of these types of cases involve defendants who were abused as children, only defendants who were abused as children can win a capital trial. While, obviously, many capital defendants who are sentenced to death fit the "abused child" profile, the State's argument ignores that many of those who never get the death penalty fit a profile closer to Robert Marshall's, as do even some of those who do. See Groseclose v. Bell, 130 F.3d 1161, 1169-1171 (6th Cir. 1997) (uninvestigated mitigation in murder-for-hire of the defendant's wife revolved around his military record, volunteer activity and charitable work; death sentence reversed for ineffective assistance of counsel). The Third Circuit properly concluded that it is difficult to imagine that at least one member of a jury that had been presented with the uninvestigated mitigation in Robert Marshall's case would not have voted differently on the issue of penalty. The State makes one of the same errors as the New Jersey Supreme Court -- missing the point of mitigation evidence. While it cannot be gainsaid that one type of mitigation strategy is to portray a defendant as abused and as having had a life of misery, it is not the only way to defend a capital case. A defendant with the plethora of mitigation that Robert Marshall's attorney should have investigated and

presented likewise clearly can prevail. And when that full mitigation case is compared with the near-complete absence of any investigation, preparation, presentation or argument in mitigation which occurred here, one cannot help but have one's confidence in the outcome be "undermine[d]." Strickland, 466 U.S. at 694.

Of course, this is a habeas corpus case, not a direct appeal, so ultimately any ruling must be made in the framework of 28 U.S.C. §2254(d) which provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision in that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

But, clearly, the Third Circuit did a proper §2254(d) analysis, first finding in its initial opinion, Marshall V, multiple ways in which the New Jersey Supreme Court's ruling had run afoul of that statute and, secondly, holding in its second opinion, Marshall VII, that the ultimate conclusion of the New Jersey Supreme Court was an unreasonable application of Strickland.

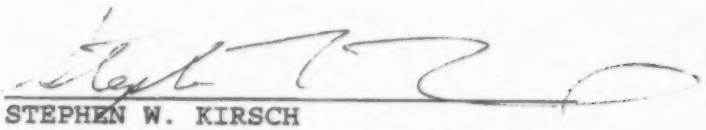
As the Third Circuit held, the New Jersey Supreme Court unreasonably failed to hold a necessary evidentiary hearing, unreasonably assumed a tactical and strategic basis for Zeitz's inaction, 307 F.3d at 109, acted "contrary to" Strickland and unreasonably applied that case by analyzing a penalty-phase-IAC claim while assuming strategic choices were both made and reasonable whenever counsel's choices were "difficult," id. at 110, analyzed the prejudice prong while "failing to consider what a lengthier, more adversarial presentation with evidence in mitigation might have contained and how that would have impacted the jury's deliberations," id., and ignored "the very function of mitigation evidence" by viewing as hopeless the prospect of seeking to convince a jury to spare the respondent's life. Id. at 114. In the face of all of those failures, the New Jersey Supreme Court also unreasonably concluded that Robert Marshall received effective assistance of penalty-phase counsel when Glenn Zeitz used a few minor "truth and veracity" character witnesses, meager "background" testimony by petitioner and a tepid, do-whatever-you-want closing argument as "mitigation" and conducted no meaningful penalty-phase mitigation investigation, thereby robbing his decision not to prepare, present and argue a case in mitigation of any possible valid "tactical" justification. The Third Circuit aptly concluded that the "state court's denial of relief to Marshall based on Zeitz's ineffective assistance during the penalty phase was an

unreasonable application of . . . clearly established Supreme Court law [i.e., Strickland] and thus Marshall is entitled to relief under the AEDPA." Marshall VII, 428 F.3d at 474. Nothing in the State's petition for certiorari casts any doubt on the reasoning of that court; nor does it raise any important issue for certiorari. Hence, the State's petition should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,



STEPHEN W. KIRSCH
ASSISTANT DEPUTY PUBLIC DEFENDER
COUNSEL OF RECORD

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